No. 80-837

1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL JOHN GRASSI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether the court of appeals properly held that petitioner's Fourth Amendment rights were not violated by the search that produced evidence against him.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15a-16a) is published at 626 F. 2d 444. The previous opinion of the court of appeals in this case (Pet. App. 1a-14a) is published at 602 F. 2d 1192.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1980. A petition for rehearing was denied on October 20, 1980. The petition for a writ of certiorari was filed on November 24, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner contends that the court of appeals erred in affirming his conviction on remand from this Court without reconsidering the question whether he had "standing" to object to the search that produced evidence against him.

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on five counts of transporting obscene films in interstate commerce, in violation of 18 U.S.C. 1465; on five counts of using a common carrier to transport obscene films in interstate commerce, in violation of 18 U.S.C. 1462; and on one count of conspiracy to commit those offenses, in violation of 18 U.S.C. 371. Petitioner was sentenced to three years' imprisonment on the conspiracy count, and to concurrent terms of two years' imprisonment on each of the substantive counts, to run consecutively to the sentence imposed on the conspiracy count. Execution of sentence on the substantive counts was suspended in favor of three years' probation.

1. Petitioner was indicted together with co-defendants William Walter and Arthur Sanders, petitioners in *Walter* v. *United States*, Nos. 79-67 and 79-148 (June 20, 1980), but he was tried separately from his co-defendants after the district court granted his motion for a severance. The facts in both cases are essentially the same. The evidence in the instant case showed that petitioner was employed by Walter and Sanders as a "roadman" for their network of adult book stores, theaters, and distribution warehouses in Florida and Georgia. His responsibilities included finding locations for and opening new stores from which he received a share of the profits. He also owned and managed an adult bookstore in Atlanta, which carried films similar to the films involved in this case. He stocked his store with materials selected from Sanders' and Walter's Trans World America (TWA) warehouse in Atlanta (II Tr. 41, 197-201; V Tr. 164-175, 191-193).[1]

Prior to trial, petitioner and his co-defendants Walter and Sanders moved to suppress certain films from evidence, alleging that the government's acquisition and retention of the films violated their rights under the Fourth and First Amendments. As related in Justice Stevens' opinion in *Walter* v. *United States*, *supra*, slip op. 1-2, the evidence showed that on September 25, 1975, employees of Walter and Sanders shipped 12 cartons containing 871 hard-core pornographic films of a homosexual nature from St. Petersburg, Florida, to Atlanta, Georgia, via Greyhound Package Express. The films were being returned to the TWA warehouse because they were not selling in the Florida adult bookstores. The shipper of the packages substituted the fictitious name "Leggs, Inc." for TWA, the

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[1] "Tr." preceded by volume number designates the reporter's transcript.

intended recipient. The use of this fictitious name resulted in an inadvertent misdelivery of the shipment by Greyhound to one of its regular customers, L'Eggs Products, Inc., a manufacturer of women's hosiery that maintains business offices in an Atlanta suburb. The hosiery company, in turn, contacted the FBI and gave the films to the government. In mid-October, petitioner, who had been assigned by Walter and Sanders to locate the shipment, inquired at the hosiery company and learned of the company's unsolicited receipt of the films and its subsequent decision to rid itself of the unwanted merchandise by giving the films to the FBI. About one or two months after the films were transferred to the government, FBI agents viewed the films with the aid of a projector.

After a hearing, the district court concluded that petitioner and his co-defendants had relinquished any legitimate expectation of privacy they may have had in the shipment when they shipped the cartons by common carrier under a fictitious name (79-67 and 79-148 A. 35-40). In the alternative, the court concluded that this case involved only a private search and therefore did not implicate Fourth Amendment interests (79-67 and 79-148 A. 41-44). Accordingly, the motion to suppress was denied.

2. The court of appeals affirmed the convictions of Sanders and Walter (*United States* v. *Sanders*, 592 F. 2d 788) (1979), and it subsequently affirmed petitioner's conviction (Pet. App. 1a-14a). This Court then reversed the convictions of Walter and Sanders, with a plurality of the Court concluding that the FBI's warrantless search of the films was unlawful. The Court subsequently vacated the judgment in petitioner's case and remanded the case to the court of appeals for further consideration in light of the *Walter* decision. *Grassi* v. *United States*, No. 79-809 (June 30, 1980).

3. On remand, the court of appeals again affirmed petitioner's conviction (Pet. App. 15a-16a). The court noted that petitioner had not raised the issue of the propriety of the search on appeal and that his only reference to that issue was in a footnote in his brief, which read as follows:

> The issue of whether the Motion to Suppress was properly denied has not been presented because of the recent decision of *United States* v. *Busch* [sic], 582 F. 2d 1016 (5th Cir. 1978) which holds that Appellant [Grassi] has no standing; if, however, this decision is overruled or reconsidered, the Appellant specifically reserves the question of whether he has standing to challenge the search and seizure of the films in the instant case.

Noting that the standing rules in the circuit had not changed to petitioner's benefit—and in fact had changed to his detriment—the court held that petitioner had not raised a Fourth Amendment issue on which relief could be granted (Pet. App. 16a).

ARGUMENT

Petitioner argues that in light of the sequence of decisions in his case and that of his co-defendants, he has improperly been denied the benefit of the ruling holding that the films that were introduced against him at trial were unlawfully searched. In fact, however, petitioner does not have standing to object to the introduction of the films against him. He conceded as much on his initial appeal, and the court of appeals properly held that nothing in this Court's remand order or in any intervening decision gave him any new basis for claiming standing.

Although the district court initially held that petitioner, as well as his co-defendants, had standing to challenge the seizure and search of the films, the court of appeals did not expressly rule on the standing question as to the co-defendants (see 592 F. 2d at 791). With respect to petitioner's case, the court of appeals did not have to face the question of standing, because petitioner conceded that he did not have standing under the governing Fifth Circuit precedents.

In *Walter*, this Court did not expressly address the issue of petitioner's co-defendants' standing. The government did not challenge Walter's and Sanders' standing (79-67 and 79-148 United States Br. at 30 n.21), since they had testified at the suppression hearing that they owned the films and had ordered their shipment to Atlanta, and the Court appears to have assumed that Walter and Sanders had standing in their capacity as owners and consignors of the films. However, nothing in the Court's disposition of *Walter*, or in its order remanding petitioner's case for further consideration in light of *Walter*, suggested that petitioner had standing despite his concession on that issue in the court of appeals.

Unlike Walter and Sanders, who were owners and consignors of the films, petitioner was merely an employee of TWA who worked for Walter and Sanders (Pet. 3). He was neither an owner of the films nor a consignor of the package that was sent from St. Petersburg to Atlanta. He therefore had no protectable Fourth Amendment interest in the films, as he conceded in his brief in the court of appeals.

Petitioner seeks to avoid the effect of his concession on the issue of standing by suggesting that the decisions of this Court in *Walter* and in *Rakas* v. *Illinois*, 439 U.S. 128 (1978), somehow altered the principles of standing in a way that gives him a right to relief that he did not enjoy at the time his case first came before the court of appeals. As the court of appeals correctly pointed out (Pet. App. 16a), however, the principles of standing have not been altered in a way favorable to petitioner, and in fact the rules of standing have narrowed, rather than expanded, the categories of persons entitled to raise Fourth Amendment claims since petitioner filed his brief in the court of appeals.[2]

Finally, petitioner contends (Pet. 13-19) that the decision of the court of appeals in this case conflicts with the remand order of this Court and with the decisions of various other courts of appeals. However, nothing in this Court's remand order spoke to the question of standing; the Court simply ordered the court of appeals to reconsider its decision in light of *Walter*. Having reconsidered petitioner's case, as ordered, the court of appeals correctly concluded that nothing in that opinion requires or warrants a different result here.

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[2]Petitioner suggests (Pet. 11-12) that the decision in *United States* v. *Bush*, 582 F. 2d 1016 (5th Cir. 1978), on which his concession on standing was premised, was overruled by the court of appeals in the *Walter* decision. This is simply not so. The *Bush* case merely held that a stockholder and corporate officer who was not present at the time of a search and had no interest in the items seized does not have standing to object to the search of the corporation's warehouse and the seizure of its films. *Id.* at 1018-1019. See also *United States* v. *Britt*, 508 F. 2d 1052 (5th Cir. 1975). In the decision in petitioner's co-defendants' case, *United States* v. *Sanders*, 592 F. 2d 788 (5th Cir. 1979), the court of appeals did not expressly rule on the issue of standing; this Court likewise did not discuss the standing issue. Accordingly, neither the court of appeals nor this Court in any way disturbed the validity of the ruling in *Bush*, on which petitioner's concession on standing was based.

Nor is there any conflict among the circuits on this issue. The cases on which petitioner relies involve situations in which a defendant has not raised an issue because the court has rejected the same claim raised by a co-defendant. In that setting, the courts have on occasion declined to hold that the defendant has waived the claim if raising it would clearly have been futile, and if the claim is determined to have merit.[3] In the present case, however, neither the court of appeals nor this Court gave any indication that petitioner had standing or that he had misunderstood the standing doctrine. His co-defendants had standing not because the law had changed but because their interest in the films was different from petitioner's. Thus, there was no change in the law of standing that in any way entitles petitioner to relief from his concession on that issue in the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JANUARY 1981

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[3]The cases on which petitioner relies are substantially different from this one. In *United States* v. *Lefkowitz*, 284 F. 2d 310, 313 n.1 (2d Cir. 1960), the court considered a claim that had been raised before the district court by a co-defendant but not by the defendant, finding that the defendant's raising the issue would have been futile. See also *United States* v. *Bagby*, 451 F. 2d 920, 927 (9th Cir. 1971). In *United States* v. *Pincione*, 565 F. 2d 404, 405 (6th Cir. 1977), the court held that a defendant preserved his claim by adopting all claims made by his co-defendant. And in *United States* v. *Love*, 472 F. 2d 490, 496 (5th Cir. 1973), the court extended the benefits of a co-defendant's claim to the defendant where the defendant's counsel clearly misapprehended the governing legal principles. Here, by contrast, petitioner knowingly waived the Fourth Amendment issue in the court of appeals on the basis of what was then—and still is—a correct view of the law of standing.